

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
)

Implementation of Sections 12 and 19)
of the Cable Television Consumer)
Protection and Competition Act of 1992)
)

Development of Competition and)
Diversity in Video Programming)
Distribution and Carriage)
)

MM Docket No. 92-265

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF DIRECTV, INC.

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SUMMARY

DirecTv and Hughes Communications Galaxy, Inc. ("HCG") are sister subsidiaries of Hughes Communications, Inc. HCG is a Commission licensee in the direct broadcast satellite ("DBS") service. DirecTv is the DBS operating, customer service and programming acquisition arm of the HCI family. Following the launch of its first DBS satellite in December 1993, DirecTv will initiate the first true DBS service in the United States. DirecTv ultimately will provide over a hundred channels of video programming directly to households throughout the United States. Thus, DirecTv will enter the video market as a multichannel video programming distributor ("MVPD") using an alternative to cable technology and other locally-based video programming delivery systems.

With the launch of its first DBS satellite less than a year away, DirecTv has announced programming agreements with Paramount Pictures and the Disney Channel, and DirecTv is continuing to pursue programming carriage agreements with cable programmers, including those that are vertically integrated with multiple cable system operators ("MSOs"). Without a substantial number of cable programming services, including those owned by the MSOs, DirecTv will not be able to introduce a service to the American public which provides the first true alternative to cable television.

This is the problem that Congress recognized and attempted to solve by adopting Section 19 of the 1992 Cable Act. DirecTv participated in the legislative process. In enacting the 1992 Cable Act, Congress issued a clear statement of policy that competition to cable is in the public interest and that, because potential competitors must have programming in order to succeed, the cable industry's stranglehold on programming must be broken. Moreover, Congress has given the Commission a clear mandate to take whatever steps are necessary to loosen cable's grip on programmers and eliminate the bottleneck in the distribution market which prevents new

service providers and new technologies from reaching the public. This is the purpose of Section 19 of the Act and this is the mandate the FCC must keep in mind in adopting these rules.

In passing the 1992 Cable Act, Congress made a policy determination in favor of increasing the number and diversity of media "voices" available to U.S. consumers, and it found that increasing the number of competing video distribution outlets in a particular market is a means to promote the development of programming. Congress recognized that, to gain a foothold in a market now dominated by the cable MSOs, alternative MVPDs require programming access assistance comparable to that extended to cable through the compulsory copyright license. The solution -- targeted administrative enforcement of access to programming - - will produce a truly competitive market.

DirecTv strongly urges the Commission to recognize the findings of Congress concerning the malfunctioning of the video marketplace and the problems of access to programming for potential competitors to cable, which Congress has directed the Commission to solve. Congress has given the Commission a broad and unequivocal mandate:

In adopting rules under [Section 19], the conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable.

Conference Report at 93. The Commission must not become embroiled in a reexamination of the programming market under traditional antitrust principles. Contrary to certain statements made in the Notice of Proposed Rulemaking, the Commission cannot consider anew whether a particular action "hinders competition" because Congress has already made a finding that there is no effective competition in the present cable programming distribution market. In adopting this legislation, Congress provided potential competitors in the cable programming distribution market

with specific remedies that are not available under existing antitrust laws. No antitrust analysis is required of the Commission.

Congress found that vertical integration has proven harmful to the development of competition between cable and other MVPDs because it has the effect of preventing the latter from obtaining programming. Therefore, Section 19 of the Act is directed primarily toward refusals to deal and other exclusionary behavior by cable operators and their vertically integrated programmers. The beneficiaries of Section 19 will be viewers, who will gain access to cable's competitors as well as to the fare of independent programmers who will find new distribution outlets for their products.

The solutions adopted by Congress in the 1992 Cable Act will work to loosen cable's grip on the video programming and distribution market and, ultimately, help produce effective competition to cable. In a truly competitive market, the Commission's regulatory role will be substantially reduced -- regulation of cable rates and service standards, as well as access to programming, will be unnecessary in an effectively competitive market environment. Congress simply determined that the competitive marketplace is not yet functioning. The way to get to that market which functions without intrusive governmental regulation has been clearly indicated by Congress: the Commission must first adopt tough regulations which allow competition to take hold for the first time.

The Commission must take an aggressive approach in adopting practical rules that will bring real pressure to bear on the cable industry and prevent discriminatory and exclusionary practices of the kind that have been documented by Congress and the Commission. Rather than endeavor to revise the statute, the Commission must take an active approach to enforce its mandate. The Commission's rules must be designed to provide real incentives for cable operators and programming vendors to comply with the will of Congress, with quick and simple remedies for aggrieved MVPDs who establish a cause of action under the statute. Because most of the information relevant to a complaint under Section 19 (such as the existence of an exclusive contract, or the cost-based justification for price differences in different contracts) is within the possession of the cable operator or the programmer, and the complainant -- the aggrieved MVPD -- will not have access to the relevant factual evidence. It is imperative to fulfilling Congress's mandate, therefore, that the Commission adopt procedures which do not impose impossible burdens of proof on MVPDs seeking to bring claims under Section 628.

In sum, because of the unequivocal statutory directive that the Commission promote services that are competitive to existing cable services, and service providers that compete with the MSOs, the Commission's reading of the specific statutory prohibitions of Section 628 should be as comprehensive as possible, taking into account all behavior that hinders competitors to cable from obtaining programming. It is vital that the Commission take adequate measures to implement this statute as Congress intended. If the Commission is vigilant at the outset, a competitive market for video programming distribution services will develop. The Commission has been charged with playing a crucial role in the development of competition in the video market. DirecTV urges the Commission to fulfill that obligation as outlined herein.

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COMMENTS OF DIRECTV, INC.

DirecTv, Inc. ("DirecTv") hereby responds to the Commission's Notice of Proposed Rule Making in the above-captioned proceeding, FCC 92-543, released December 24, 1992 (the "NPRM"), concerning implementation of the provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "1992 Cable Act") with respect to access to cable programming (Section 19).

I. INTRODUCTION

A. DirecTv's Interest In This Proceeding

DirecTv and Hughes Communications Galaxy, Inc. ("HCG") are sister subsidiaries of Hughes Communications, Inc. ("HCI"). HCG is a Commission licensee in both the fixed satellite service and the direct broadcast satellite ("DBS") service. DirecTv is the DBS operating, customer service and programming acquisition arm of the HCI family.

Following the launch of the first DBS satellite in December 1993, DirecTv will initiate the first true DBS service in the United States -- that is, provision of a multichannel video programming service to home dishes approximately eighteen inches in diameter, via satellites operating in the DBS band at 12/17 GHz -- in early 1994. With its full complement of satellites

in orbit, DirecTv will provide over a hundred channels of video programming directly to households throughout the United States. Thus, DirecTv expects to enter the video market as a multichannel video programming distributor ("MVPD") using an alternative to cable technology and other locally-based video programming delivery systems.^{1/}

With HCG's state-of-the-art DBS system substantially constructed, the single most important issue facing DirecTv is obtaining programming carriage agreements from a variety of sources, including programmers who are owned by cable system operators or those who until now have sold their product primarily through cable systems. DirecTv, which with its sister companies has invested hundreds of millions of dollars in DBS technology, has been pursuing programming agreements through informal discussions and formal negotiations with these cable programmers, as well as with the movie studios, broadcasters, sports rights holders, and other sources of programming, since HCG first received its DBS authorization from the Commission. Until recently, DirecTv had not entered into agreements with any video programming vendors. Recently, DirecTv has been engaging in intensive negotiations with cable programming vendors (both vertically integrated with cable system operators and non-vertically integrated) and DirecTv has announced its first agreements for carriage of video programming on the HCG DBS system: Paramount Pictures for pay-per-view movies and the Disney Channel. Neither of these programming vendors is owned by or co-owned with any cable system. Together, they represent only a fraction of all the programming necessary for DirecTV to have a competitive offering. Thus far, DirecTv has not been able to announce any program carriage agreements with any vertically integrated cable programming vendors.

Launch of HCG's first DBS satellite is less than a year away, and DirecTv is continuing to pursue programming carriage agreements with cable programmers, including those

^{1/} See note 21, *infra*, and accompanying text regarding the scope of the definition of MVPD under the 1992 Cable Act.

that are vertically integrated with multiple cable system operators ("MSOs"). Without a substantial number of cable programming services, including those owned by the MSOs, DirecTV will not be able to successfully introduce a service to the American public which provides a true alternative to cable television.

This is the problem that Congress recognized and attempted to solve by adopting Sections 19 and 12 of the 1992 Cable Act. DirecTV participated in the legislative process. In enacting the 1992 Cable Act, Congress issued a clear statement of policy that competition to cable is in the public interest and that, because potential competitors must have programming in order to succeed, the cable industry's stranglehold on programming must be broken. Moreover, Congress has given the Commission a clear mandate to take whatever steps are necessary to loosen cable's grip on programmers and eliminate the bottleneck in the distribution market which prevents new service providers and new technologies from reaching the public. This is the purpose of Sections 19 and 12 and this is the mandate the FCC must keep in mind when implementing these portions of the Act.

B. The Statutory Scheme

A primary goal of the 1992 Cable Act is to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media." 1992 Cable Act §2(b)(1). A complimentary goal is to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers." Id., §2(b)(5). In structuring the 1992 Cable Act, Congress made a policy determination in favor of increasing the number and diversity of media "voices" available to U.S. consumers, and it found, as a factual matter, that increasing the number of competing video distribution outlets in a particular market is a means to promote the development of programming. Congress found that expanding the number of competitors to cable will directly benefit the public by providing additional and

competing outlets for a diverse selection of programming.² Thus, encouraging new service providers using existing or new video delivery technologies that compete effectively with entrenched cable television systems is an important goal of the 1992 Cable Act.³

Potential competitors in the video distribution market cannot succeed without programming. The direct goal of the Cable Act's "program access" provisions is to increase the availability of programming to new and existing alternative MVPDs. The ultimate goal of making programming available to competing MVPDs is to foster competition to cable, which Congress has clearly found to be in the public interest.

Although potential competitors to cable have always had the antitrust laws at their disposal, in enacting this statute Congress, while relying on structural antitrust-like principles, deliberately went beyond the scope of existing antitrust law because of its desire to "jump start" competition.⁴ Congress acknowledged that the cable industry's extraordinary success is attributable in significant part to the cable television compulsory copyright license, which gives cable operators the opportunity to obtain broadcast programming at below-market rates -- a form

² See, e.g., 1992 Cable Act §2(a) ("Findings":...(4) The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers....(6) There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media."); H.R. Rep. No. 102-628 (accompanying H.R. 4850), House Comm. on Energy & Commerce, 102d Cong., 2d Sess. (1992) ("House Report") at 40-41 ("increased concentration and integration [in the cable industry] could undermine competition and reduce diversity in information and entertainment programming").

³ See H.R. Rep. No. 102-862, House Comm. on Energy & Commerce, 102d Cong., 2d Sess. (1992) ("Conference Report") at 93 ("The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable....").

⁴ E.g., S. Rep. No. 102-92 (accompanying S.12), Senate Comm. on Commerce, Science & Transportation, 102d Cong., 1st Sess. (1991) ("Senate Report") at 28-29 (existing antitrust laws preclude many competitors, particularly start-up companies, from any remedy at all because of the expense and protracted nature of antitrust lawsuits; this statute was designed to provide remedies not currently available). See also House Report at 42 (congressional goal of diversity in media necessitates imposing ownership limits "substantially below those that a traditional antitrust analysis would support").

of "access to programming" somewhat analogous to Section 19.^{5/} Now, Congress again has recognized that alternative MVPDs require programming access assistance comparable to that extended to cable in its infancy, in order to gain a foothold in a market now dominated by the cable MSOs. Congress made a conscious decision to sacrifice, if necessary, some of the potential short-term efficiencies of a highly integrated cable industry in favor of promoting the long-term efficiencies of more viable competitors and more consumer choices in the video programming market. The solution -- targeted administrative enforcement of access to programming -- will produce a truly competitive market where, in the long run, further government intervention will not be necessary.^{6/}

Congress found that vertical integration has proven harmful to the development of competition between cable and other MVPDs because it has the effect of preventing the latter from obtaining programming.^{7/} Therefore, Section 19 of the Act is directed primarily toward

^{5/} From its inception in the 1950s to 1976, cable could retransmit broadcast programming without paying any fee or royalty. See Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, reh'g denied, 393 U.S. 902 (1968); Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974). In 1976, Congress changed the arrangement between cable operators and broadcasters by adopting the compulsory copyright license found in Section 111 of the Copyright Act. 17 U.S.C. § 111(c). The compulsory copyright put cable operators on equal or superior footing in relation to the then-entrenched broadcast industry, thus permitting consumers wider choice and facilitating the rapid growth of cable services. See, e.g., 138 Cong. Rec. S 588 (daily ed. Jan. 29, 1992) (Statement of Sen. Hollings concerning S. 12).

^{6/} See, e.g., 137 Cong. Rec. S 582 (daily ed. Jan. 14, 1991) ("Without access to popular programming, cable can keep programming locked up and prevent competition from developing. On the other hand, once competition is allowed to develop, we can let the market, rather than regulation, protect consumers. Policies aimed at promoting competition and preventing market abuses simultaneously advance diversity in the marketplace of ideas.") (statement of Senator Danforth introducing S.12).

^{7/} E.g., 1992 Cable Act § 2(a)(5); House Report at 40-44; Senate Report at 24 (due to the absence of competition at the local level, "the [cable] operator in certain instances can abuse its locally-derived market power to the detriment of programmers and competitors....these concerns are exacerbated by the increased vertical integration in the cable industry"); Senate Report at 25-26 ("Vertical integration raises two concerns. First, the Committee received testimony that vertical integration gives cable operators the incentive and ability to favor their affiliated programming services. [...] Second, the Committee received testimony that vertically integrated cable programmers have the incentive and ability to favor cable operators over other video

refusals to deal and other exclusionary behavior by cable operators and their vertically integrated programmers. Section 19 is designed both to deter anti-competitive behavior by cable operators toward competing MVPDs and to require programmers to deal with multiple MVPDs on the same terms as they deal with their affiliated cable systems.⁸ In addition, Section 19 prohibits exclusive arrangements between cable programmers and non-affiliated MVPDs if they prevent other MVPDs from obtaining the programming and providing it to their subscribers.⁹ The beneficiaries of Section 19 will be viewers, who will gain access to cable's competitors as well as to the fare of independent programmers who will find new distribution outlets for their products.

The solutions adopted by Congress in Section 19 of the 1992 Cable Act will work to loosen cable's grip on the video programming and distribution market and, ultimately, help produce effective competition to cable.¹⁰ In a truly competitive market, the Commission's regulatory role will be substantially reduced -- regulation of cable rates and service standards, as well as access to programming, will be unnecessary in an effectively competitive market

distribution technologies through more favorable prices and terms. Alternatively, these cable programmers may simply refuse to sell to potential competitors." See also 1990 Cable Report, 5 FCC Rcd. 4962, 5006-5021 (1990).

⁸ See, e.g., Senate Report at 27 ("To ensure that cable operators do not favor their affiliated programmers over others, the legislation bars cable operators from discriminating against unaffiliated programmers."). In addition, because of the dominance of a relatively small number of MSOs in today's video programming distribution market, even non-vertically integrated programmers have an incentive to deal exclusively with cable operators, grant them preferential treatment, and otherwise defer to their influence, and a corresponding disincentive to deal with other MVPDs. See, e.g., House Report at 42-43; Senate Report at 24-26. Therefore, Section 19 also prohibits unfair methods of competition by cable operators the purpose or effect of which is to hinder significantly or prevent any MVPD from providing cable programming to subscribers. 1992 Cable Act, § 628(b)(2).

⁹ Any practice by a vertically integrated programmer that "discriminates" between MVPDs in the prices, terms or conditions of the sale of programming is presumed to be unlawful under Section 628(b)(2)(B). See infra, Section II. B.2.

¹⁰ See, e.g., Senate Report at 1 ("the purpose of this legislation is to promote competition in the multichannel video marketplace" and the FCC is directed "to adopt regulations aimed at curbing the cable operators' and programmers' market power").

environment. Thus, one of the ultimate goals of the 1992 Cable Act is to "rely on the marketplace, to the maximum extent feasible, to achieve that availability [of a diversity of media outlets]." 1992 Cable Act, §2(b)(2). Congress simply determined that the competitive marketplace is not yet functioning. The way to get to that market which functions without intrusive governmental regulation has been clearly indicated by Congress: the Commission must first adopt tough regulations which allow competition to take hold for the first time.

C. The Proposed Rules

DirecTv's comments generally follow the organization of the NPRM. However, as a preliminary, overall comment, DirecTv strongly urges the Commission to recognize the findings of Congress concerning the malfunctioning of the video marketplace and the problems of access to programming for potential competitors to cable, which Congress has directed the Commission to solve. Congress has given the Commission a broad and unequivocal mandate:

In adopting rules under [Section 19], the conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable.

Conference Report at 93.

The Commission must take an aggressive approach in adopting practical rules that will bring real pressure to bear on the cable industry and prevent discriminatory and exclusionary practices of the kind that have been documented by Congress and the Commission. For example, Congress already has determined that there is no properly functioning marketplace for video programming services -- this is a fundamental justification for the statute. Therefore, the Commission need not and, indeed, cannot properly ask how its implementing regulations under Section 19 can rely on "marketplace forces" at this time. See NPRM at ¶ 12. No such forces

exist. It is only when the objectives of the statute are achieved and competition is firmly established that the Commission will be able to rely on the marketplace in lieu of regulation. This, and nothing else, is what Congress intended. See, e.g., 137 Cong. Rec. S 582 (daily ed. Jan. 14, 1991) ("once competition is allowed to develop, we can let the market, rather than regulation, protect consumers") (statement of Senator Danforth introducing S.12).

Moreover, the Commission lacks the authority to reopen questions about the extent of influence that cable MSOs have over affiliated programmers or whether unjustified differences in programming prices harm competitors providing the same type of services¹¹ -- Congress already has made findings concerning these matters, and the legislative history of the 1992 Cable Act (as well as that of the consistent pattern of similar bills that were introduced in the two previous Congresses) is replete with evidence of abusive practices by the cable industry; this history is the basis of the statutory language Congress adopted and the Commission is now charged to enforce.

Rather than question the premises of the statute or endeavor to rewrite it, the Commission must take an active approach to enforce its mandate. The Commission's rules must be designed to provide real incentives for cable operators and programming vendors to comply with the will of Congress, with quick and simple remedies for aggrieved MVPDs who establish a cause of action under the statute. Because the statute is aimed at regulating behavior within the cable industry, behavior which is conducted behind closed doors and therefore not knowable by unaffiliated parties, the touchstone for FCC enforcement should be, as the statute provides, a showing of a deleterious effect on competitors to existing cable operators (e.g., different prices offered to different MVPDs for the same type of service, or the inability of a MVPD to obtain programming from a particular vendor). Thereupon, the burden of proof should shift to the cable operator to show that its contract with an affiliated programmer is not exclusive, or to the

¹¹ See, e.g., NPRM at ¶ 10 & n. 26, ¶ 12.

programmer to establish a specific, cost-based justification for price differences in the sale of programming to different MVPDs providing the same type of service. Ultimately, the efficacy of the rules adopted under the Cable Act will depend largely on whether the Commission places the burden of proof correctly on the party best able to show compliance or non-compliance with the statute.

II. THE PROPOSED RULES UNDER SECTION 628 OF THE COMMUNICATIONS ACT (SECTION 19 OF THE 1992 CABLE ACT)

A. General Program Access Issues In Section 628 Of the Communications Act

In the initial section of the NPRM (¶¶6-12), the Commission asks a number of general questions about the interpretation of new Section 628 of the Communications Act, the "program access" provision. DirecTV's views about the correct overall approach to this section are set out above. The answers to the Commission's questions must be developed in the context of the language of the statute and congressional intent, as described above.

1. The Prohibition Against Unfair Methods of Competition and Unfair or Deceptive Acts or Practices Under Section 628(b) Is Broad and Encompasses Conduct Beyond That Proscribed By Section 628(c).

Section 628(a) states the general purpose of the section,^{12/} Section 628(b) contains an explicit statutory prohibition, and Section 628(c) directs the Commission to adopt regulations to "specify particular conduct that is prohibited by subsection (b)", giving as examples three specific classes of conduct which must be prohibited by such regulations. By its terms, Section 628(c) provides that the Commission must prescribe whatever regulations are necessary to "increas[e] competition and diversity in the multichannel video programming market and the continuing development of communications technologies," and that the particular regulations specified in Section 628(c) are the minimum that the Commission must do to implement Section

^{12/} The purposes of Section 628 are (1) increasing competition and diversity in the multichannel video programming market, (2) increasing the availability of satellite broadcast programming to persons not currently able to receive such programming, and (3) spurring the development of communications technologies.

628. Section 628(d) then provides for adjudicatory proceedings at the Commission for aggrieved MVPDs, and Sections 628(e) and (f) authorize the Commission to impose a variety of remedies and to collect such information as may be necessary to enforce this section of the Act. Under Section 628(g), the Commission must report to Congress annually on "the status of competition in the market for the delivery of video programming."

It is true that the Commission must adopt specific regulations to prohibit the three particular kinds of behavior which are listed in Section 628(c):¹³ (A) undue or improper influence by a cable operator over a programming vendor's decision to sell or the price, terms and conditions of sale of programming to an unaffiliated MVPD, (B) discrimination by a programming vendor in which a cable operator has an attributable interest in the prices, terms and conditions of sale of programming, and (C) exclusive programming contracts between cable operators and programming vendors. However, as described below, under Section 628(b)'s broad prohibition, Congress also has charged the FCC with a larger responsibility to ensure the growth of competition among video distribution media and the "development of communications technologies" (such as DBS), and the rules adopted under Section 628 must reflect this policy.

Thus, Section 628(b) is the heart of Section 628.¹⁴ It means that the Commission must prohibit any "unfair methods of competition or unfair or deceptive acts or practices" --

¹³ The regulations to be adopted under Section 628(c)(2) will apply to both the integrated cable programmer ("satellite cable programming vendor in which a cable operator has an attributable interest") and certain broadcast superstations, regardless of whether affiliated with a cable operator ("satellite broadcast programming vendor"). For brevity's sake, however, these Comments discuss only satellite cable programming vendors.

¹⁴ The text of Section 628(b) reads as follows:

It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers.

whether enumerated in Section 628(c) or not -- if the Commission finds that the purpose or effect of such methods, acts or practices is to "hinder significantly" or prevent any MVPD from providing covered programming to subscribers. Even if a practice is not specifically proscribed under Section 628(c), a complaint states a prima facie case under Section 628 if it alleges that a cable operator or a vertically integrated cable programmer is engaged in a practice that (i) is unfair or deceptive and (ii) represents a significant hinderance to the provision of programming service to consumers by another MVPD.

Section 628(b) encompasses refusals to deal as well as other discriminatory and exclusionary conduct beyond the specific prohibitions in Section 628(c).^{15/} The intent of Congress was to paint with a broad brush to end "unreasonable cable industry practices" that inhibit competing MVPDs from gaining entry to the video distribution market, "including restricting the availability of programming and charging discriminatory prices to non-cable technologies" without justification. Conference Report at 93. Therefore, Section 628(b) makes unlawful all practices by vertically integrated programmers which prevent or significantly hinder cable's competitors from providing that programming. Thus, the focus of Section 628 is on hinderance to competitors to cable -- a much lower threshold than "hinderance to competition" under traditional antitrust analysis. The Commission is incorrect when it suggests otherwise in the NPRM.^{16/}

^{15/} The specific language of Section 19 was introduced by Representative Tauzin. 138 Cong. Rec. H6531-6544 (daily ed. July 23, 1992). Rep. Tauzin explained that Section 628 was designed to prohibit refusals to deal by the vertically integrated MSOs, as well as refusals to sell programming to competing MVPDs at a comparable price. Id. at H6534.

^{16/} For example, the Commission suggests that a "harm to competition" analysis is required when it requests comment on the showing required to be made under Section 628 where a particular activity is unfair or discriminatory to a competitor of cable "yet does not significantly harm competition." See NPRM at ¶10 & notes 27 & 28. In its discussion of the exclusive contracts prohibition, the Commission states, "it appears that an analysis of anticompetitive harm ... is required to find violations" of Section 628(c)(2)(C)). NPRM at ¶34.

Moreover (and conversely), the requirement of hinderance to competitors under Section 628(b) is not, as the Commission suggests in the NPRM, a threshold requirement for any complaint under Section 628(c) of the Act. See NPRM ¶ 10. Rather, Section 628(c) identifies certain types of behavior that per se have been found by Congress to meet the standard of an actionable practice under Section 628(b) -- that is, behavior that is by definition unfair or deceptive and hinders competitors from providing cable programming services. The requirement that a practice or act specifically be shown to hinder competitors applies only to activities or practices not specified in Section 628(c).

Thus, in considering complaints under Section 628(b), the Commission should keep in mind that Congress has already found that the types of behavior enumerated in Section 628(c) -- including discriminatory pricing and exclusive contracts -- are inherently unfair practices that hinder competitors from providing cable programming to subscribers. For complaints involving these kinds of behavior, the Commission may not demand evidence that such behavior is also harmful to competitors. That finding has already been made by Congress. For other kinds of behavior not specified in Section 628(c), the Commission may rightly demand that the complainant offer evidence that the activity has the purpose or effect of hindering competitors. However, if a MVPD establishes an "unreasonable refusal to deal" or other practice that hinders it from providing programming to subscribers, the inquiry is over -- the MVPD does not also have to prove "harm to competition" as suggested by the NPRM.

2. "Attributable Interest" Must Be Broadly Defined.

The prohibitions of Section 628 apply to (a) cable operators, (b) satellite cable programming vendors in which a cable operator has an attributable interest, and (c) satellite broadcast programming vendors. The Commission has requested comment on adopting the standards used in the broadcast industry for defining "attributable interests" under Section 628. NPRM ¶9. DirecTv strongly disagrees with this proposal for two reasons. Under the broadcast

rules, the Commission basically does not consider an interest "attributable" unless it is a present voting equity interest of at least five percent (or, in the case of a partnership, a non-insulated limited partnership interest or a general partnership interest), or a managerial position. The rationale for the Commission's broadcast rules is the Commission's interest in the control of broadcast stations, based on its goal of ensuring a wide diversity of broadcast "voices".^{17/} This is in contrast to the concerns raised under the Cable Act about the incentives that cable operators have to thwart competition by exercising undue influence over their suppliers, the programming vendors. For example, non-voting or minority stockholders may have significant influence over a programmer's contract decisions even if they do not have the ability to "control" the programmer in the sense of voting on the day-to-day business decisions of the company, particularly if they are also distributors of the programmer's product. For this reason, the Commission must look beyond the indicia of control adopted in the broadcast area when defining "attributable interest" in the cable area.^{18/}

^{17/} See Attribution of Ownership Interests in Broadcasting, Cable Television and Newspaper Entities, 97 FCC 2d 997, 1004 (1984) ("The underlying multiple ownership rules are premised on the principle that 'a democratic society cannot function without the clash of divergent views.'"), reconsidered in part, 58 Rad. Reg. 2d [P&F] 604 (1985), on further reconsideration, 1 FCC Rcd. 802 (1986).

^{18/} The cable operators made a similar argument in favor of retaining the existing cross-ownership rules for local telephone companies and companies providing video programming in CC Docket 87-266. There, the FCC proposed loosening restrictions that prohibited any element of ownership or financial interest, in including debtor-creditor relationships, between a telco and a cable system or other video programming provider, or more than one percent of common ownership between a telco and a cable system (or other video programming provider) if either one is a corporation with 50 or more stockholders. 47 C.F.R. § 63.54, Note 2 (1991). The cable operators vehemently opposed the adoption of the more lenient broadcast TV-cable TV cross-ownership rules as a model for cable-telco cross-ownership, stating that the broadcast rules were designed to assure diversity in media programming whereas the cable-telco rules were designed to prevent abuse of market power through discrimination and other anti-competitive conduct by the telcos. They pointed out that, because of the telcos' dominant position in the local distribution market, permitting them to take an interest in video programming providers would give them an incentive to discriminate in favor of their affiliates to the detriment of unaffiliated cable systems seeking to use the telcos' facilities. See Telephone Company-Cable Television Cross-Ownership Rules (Second Report & Order), 7 FCC Rcd. 5781 (1992) at ¶ 33. The Commission ultimately decided that the fears of the cable operators were misplaced because the Commission already had

Moreover, the reasons for defining attributable interest for broadcast stations are different from the reasons for defining attributable interest for cable programmers. In the broadcast industry, there is competition at both the local and the national level. While the Commission is interested in ensuring a diversity of broadcast "voices", there is no concern that any entity or group exercises undue influence over broadcast programming suppliers the way that Congress has found the few largest cable MSOs are able to influence the cable programming vendors.¹⁹

For these reasons, DirecTv suggests that the Commission broaden the proposed attribution rules to include: (i) voting or nonvoting equity interests of 5% or more, (ii) debt interests if accompanied by an option, warrant or other security convertible to 5% or more voting equity, (iii) any debt or equity interest accompanied by a right to elect a board member, (iv) any board seat or officer position, (v) the interest of anyone empowered to elect or appoint a board member or officer, and (vi) general partnership interests of any size, and (vii) limited partnership interests of 5% or more. If one of the interests enumerated above is held indirectly, through an intervening corporation or partnership, the presumption should be that such intervening interest does not affect the "attributable" nature of the ultimate interest as long as it, too, is "attributable" under these standards. For example, a board position in a corporation that holds 5% of the

in place an effective cost accounting and anti-discrimination regulatory scheme for telcos, and the Commission decided to permit common ownership between video programming providers and telcos of up to 5% of voting or non-voting equity; however, the objection the cable operators raised about the telcos and video programming providers seem to fit even more aptly the relationship between cable operators and their affiliated video programming vendors, who are not subject to common carrier cost accounting regulation or other structural and non-structural safeguards against cross-subsidization.

¹⁹ See, e.g., House Report at 40 (there are currently no regulations applicable to the cable industry that compare to regulation of both vertical and horizontal concentration in the broadcast industry). See generally 1990 Cable Report, 5 FCC Rcd. 4962, 5006-5008, 5021.

equity of a programming vendor should be considered "attributable" for purposes of Section 628.²⁹

3. *The "Geographic Market" for Purposes of Evaluating the Existence of Harm Should Be National Where the Programming Is Nationally Distributed.*

The Commission also asks, "where evaluating the existence of 'harm' under Section 628, what geographic market would be relevant to determining whether a proscribed behavior, such as an unjustified price differential by one program vendor between two programming distributors, causes anticompetitive harm in the market." NPRM at ¶ 11. The statute does not, by its terms, limit the prohibition against anti-competitive behavior to practices in markets where cable operators have cable systems, nor markets where vertically integrated programmers have affiliated cable systems. DirecTv is a national service provider. It will offer many programming services to households across the country, and it therefore seeks national program carriage rights. National distribution will enable DirecTv to achieve economies of scale comparable to those enjoyed by the national MSOs and the broadcast networks. If DirecTv is unable to obtain programming from a particular vendor, the provisions of Section 628 should apply to that vendor if it has an affiliated cable system anywhere in the United States. By denying DirecTv access to programming in a particular part of the country, the vertically integrated programmer can weaken DirecTv's ability to compete not only in that market but nationwide, because DirecTv's economies of scale will be diminished. Therefore, if the price charged to DirecTv is higher than the price charged by the vendor to its affiliate cable system anywhere in the United States, it should be actionable under Section 628(c)(2)(B).

²⁹ While it is important for the Commission to focus on anti-competitive behavior by vertically integrated cable programmers and cable operators, the Commission should not lose sight of the fact that the statutory prohibition of Section 628(b) applies to all cable operators, regardless of whether they own interests in programming vendors. See NPRM at ¶ 8 & note 18.

4. *The Definition of MVPD Should Include Only Persons Who Sell Video Programming To Subscribers.*

Section 628 provides a remedy to MVPDs who seek to compete with cable operators and are significantly hindered by the unfair or anti-competitive acts or practices of the cable industry. The definition of MVPD is important in many other provisions of the Act as well, in terms of both the benefits and the burdens of the statute. DirecTv previously commented on the correct interpretation of Section 2(c)(6) of the Act, and briefly comments here.^{21/}

A MVPD is defined in the 1992 Cable Act as:

a person such as, but not limited to, a cable operator, a multichannel, multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming

1992 Cable Act §2(c)(6) [emphasis added]. Although the statute clearly contemplates that a "DBS service" should be included in the definition of MVPD, it does not define "DBS service." Significantly, the statute limits the MVPD definition to persons or entities which "make available for purchase" multiple channels of video programming to "subscribers or customers." Thus, it does not appear that the statute intended to include in this definition all DBS licensees, regardless of where they fit in the chain of programming distribution.^{22/} Instead, MVPDs include only entities that actually sell programming to subscribers or customers. The statutory definition of MVPD therefore should be interpreted as differentiating between an entity performing a delivery function

^{21/} The Commission requested comment on the definition of MVPD in MM Docket No. 92-259, "Broadcast Signal Carriage Issues" (Notice of Proposed Rule Making, released Nov. 19, 1992) (the "Broadcast Signal Carriage Issues NPRM"). As stated in its Comments in that proceeding (filed Jan. 4, 1993), DirecTv believes that it will be, at least in some circumstances, a MVPD under the 1992 Cable Act.

^{22/} As recognized by the Commission, it is likely that, in the DBS market, video programming will sometimes be sold via a "chain" of service providers, with one entity -- the DBS licensee -- performing a pure transmission service/programming delivery function (without dealing directly with subscribers or consumers of the video programming) and one or more other entities selling programming to subscribers or consumers.

with respect to the video signal, and an entity that actually sells programming (over its own facilities or by lease of satellite capacity from another) and interacts with the home viewer. As the Commission stated in the must-carry and retransmission consent proceeding, "it appears logical that the retransmission consent obligation should fall on the entity directly selling programming and interacting with the public." Broadcast Signal Carriage NPRM at ¶ 42.

DirecTv believes the Commission should find, as a matter of law, that MVPDs under the statute include only those entities that sell programming directly to subscribers or consumers, and should exclude entities that merely provide channel capacity for the transmission of video programming that is ultimately sold by others to subscribers.²⁹ Under this construct, where video programming is sold by a DBS licensee directly to home viewers the DBS licensee would be a MVPD, and in such capacity would be eligible to bring a complaint under Section 628. An entity that distributes video programming may, of course, act in the capacity of MVPD with respect to some of its activities and not with respect to the rest. It is likely that DirecTv will fall into this category. The effect of this distinction is completely consistent with the construct of Section 628. Thus, with respect to transponder capacity over which DirecTv provides programming to subscribers, it will be negotiating for program carriage rights, and it should have the right to bring an action under Section 628 if it has a grievance addressed by the statute. On the other hand, where DirecTv is merely leasing or selling transponder capacity to another entity that provides programming to subscribers, DirecTv is not the intended beneficiary of the statute, and should not be characterized as an MVPD with respect to that transponder capacity.

²⁹ The Conference Report provides little elucidation of Congressional intent with respect to satellite programming providers, but the plain language of the statute clearly specifies that MVPDs must sell programming to subscribers or customers. It is clear, therefore, that an entity that merely sells bulk transponder capacity to a programmer is not a MVPD.

5. *The Best Way to Accomplish Section 628's Objectives In a Manner That is Faithful to the Policy of Congress to "Rely on Marketplace Forces" Is For the Commission To Strictly Enforce Section 628 Now.*

The Commission seeks comment on "how we can best accomplish Section 628's objectives in a manner that is faithful to the policy of Congress in the 1992 Cable Act to 'rely on the marketplace, to the maximum extent feasible' in promoting the availability of programming to the public through cable television and other video distribution media." NPRM at ¶12 (citing 1992 Cable Act §2(b)(2)). With all due respect, the answer to the Commission's query is contained in the Act itself.

By adoption of stringent regulations and strict enforcement under Section 628, the Commission will foster the development of competing video distribution media. In so doing, the Commission will help to create a marketplace that, over time, will function efficiently without the need for further Commission intervention, because that marketplace will be competitive, and exclusionary and predatory behavior with an anticompetitive purpose or effect of the kind targeted by Section 628 will not be a feasible method of doing business in such an environment. The Commission cannot, however, attempt to "rely on marketplace forces" now, when Congress has just made findings that there is no competitive marketplace for cable programming and distribution services. The very purpose of the Cable Act is to encourage the development of new and competing MVPDs so that marketplace forces will take over and Commission regulation can be short-lived. The legislative history of the statute makes this clear.^{24/}

^{24/} See, e.g., House Report at 43-44 ("Passage of the [1984] Cable Act was predicated on the belief that emerging competition in the video marketplace would eliminate the need for substantial government regulation of the cable industry...The Committee was also concerned that the Cable Act not give cable operators undue advantage over competitors...in the delivery of video programming. National communications policy has promoted the growth and development of alternative delivery systems for these services, such as DBS, SMATV and subscription television. The public interest is served by this competition and it should continue.' The Committee continues to believe that competition is essential both for ensuring diversity in programming and for protecting consumers from potential abuses by cable operators possessing market power. However, for a number of reasons, such competition has not emerged on a widespread basis. The Committee believes that steps must be taken to encourage the further

B. Specific Provisions Required To Be Adopted Under Section 628

As noted above, Section 628(c) sets forth the minimum regulatory standards which must be enforced by the Commission to implement the broad prohibition of Section 628(b). DirecTV's comments on the proper interpretation of the specific prohibitions contained in Section 628(c) are set forth below.

1. "Undue or Improper Influence" In Programming Distribution Under Section 628(c)(2)(A).

Section 628(c)(2)(A) requires the Commission to adopt regulations to:

establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programmer ... from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms and conditions of sale of, satellite cable programming ... to any unaffiliated [MVPD].

1992 Cable Act § 628(c)(2)(A) (emphasis added). The Commission requests suggestions concerning the kinds of behavior that would constitute "undue or improper influence" by a vertically integrated cable operator. NPRM at ¶14.

It will be difficult for an aggrieved unaffiliated MVPD to know what actions a cable operator may have taken to influence a vertically integrated programming vendor's dealings with unaffiliated MVPDs. The MVPD will not be "in the room" when such conversations occur. Therefore, the Commission must allow aggrieved MVPDs to submit probative circumstantial evidence in support of a complaint under this section. For example, a prima facie case of undue influence is established if it shown that a vertically integrated programmer refuses to sell programming to an unaffiliated MVPD that is creditworthy and technically cable of delivering the programming service. 'This should be sufficient to shift the burden to the cable operator to rebut such evidence. Similarly, where an unaffiliated MVPD is offered programming from a vertically integrated programmer on unreasonable terms, the burden should be on the programmer to show

development of robust competition in the video programming marketplace.")(citation omitted).